IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 381 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ARVINDBHAI AMBALAL PATEL

Versus

STATE OF GUJARAT

Appearance:

MR MAHENDRA K PATEL for Petitioner

Mr S P Dave, APP for Respondent No. 1

Mr Kamlesh Mehta for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 18/04/2001

ORAL JUDGEMENT

Rule, Mr S P Dave, learned APP appearing for the State of Gujarat-respondent no.1 waives service of rule on behalf of respondent No.1. Mr Kamlesh Mehta, learned Advocate appearing for respondent no.2 herein waives service on behalf of respondent no.2.

2. I have heard learned Advocates for the parties and have perused the papers. On going through the records and proceedings of this Revision Application, it is clear that the complainant has filed the aforesaid complaint for offence punishable under Section! 342 and 504 before the learned Judicial Magistrate First Class, Visnagar on 8.2.1992. It also shows that after receiving the complaint, learned Magistrate has passed the order for holding enquiry by the Court itself under Section 202 of the Criminal Procedure Code, 1973 (for short 'the Code'). The law on this subject is very clear. As soon as a private complaint is received by the Court of JMFC, the Court is obliged to examine the complainant on oath. Section 202 of the Code may be reproduced as under:

"Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Sec.192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for the investigation shall be made -

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, or

(b) where the complaint has not been made by a court, unless the complainant and the witness present (if any) have been examined on oath under section 200

(2) In an enquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he

shall have for that investigation all the powers conferred by this Code on an office-in-charge of a police station except the power to arrest without warrant.

On going through the said provision, it is clear that the learned Magistrate taking cognizance of the offence is required to examine the complainant and witnesses on oath before proceeding ahead with the said complaint. As said above, before passing an order for enquiry under section 202 of the Code, the learned Magistrate has not examined the complainant on oath. Therefore, the further orders passed by the learned Magistrate cannot be sustained. It is well settled that when a Magistrate receives a private complaint, he has first to examine the complainant on oath, if he takes cognizance of the offence after examining the complainant on oath, the Magistrate has following options:

(1) To hold an enquiry by himself under section 202 of the Code,

(2) To refer the matter for investigation under section 202 of the Code to the concerned police station

(3) To issue process for appropriate offence,

(3) To dismiss the complaint under section 203 of the Code.

If however, a complaint is referred for investigation under Section 156 (3) of the Code, then the examination of the complainant on oath is not required. But so far as enquiry under section 202 of the Code is concerned, before ordering such an enquiry, it was an obligatory duty on the part of the learned Magistrate to examine the complainant on oath under section 202. The aforesaid mandatory and solitary provisions have been violated and, therefore, the order passed by the learned Magistrate cannot be sustained in the eye of law. Under the aforesaid circumstances, the orders passed by the learned Magistrate are illegal on the face of the record and, therefore, the said orders are required to be quashed.

3. In the result, the present Revision Application is partly allowed. The orders passed by the learned Magistrate are quashed and set aside. The matter is remanded to the learned Judicial Magistrate First Class, Visnagar with a direction to proceed ahead in respect of the complaint in question in accordance with law and

keeping in mind the observations made hereinabove.

Rule is made absolute to the aforesaid extent.

18.4.2001 [D P Buch, J.]
msp